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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19 70

NO. [redacted] 185

DEANE HILL COUNTRY CLUB, INC.,
A CORPORATION,
Petitioner,

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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5-15-70-50

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CITATIONS

Case:

Maryland v. Wirtz,
392 U.S. 183, 88 S. Ct. 2017 (1968) 7

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UNITED STATES DEPARTMENT OF LABOR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Deane Hill Country Club, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause April 17, 1970.

OPINION BELOW

The opinion of the United States District Court appears on pages 18 to 31 of the Appendix to Brief of Defendant-Appellant filed in the United States Court of Appeals for the Sixth Circuit.

The judgment of the United States Court of Appeals for the Sixth Circuit is annexed hereto as an appendix on page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered April 17, 1970. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) DID THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN HOLDING THAT PETITIONER IS AN "ENTERPRISE" WITHIN THE MEANING OF SECTION 3(r) OF THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, (29 U.S.C. 203(r)), SO AS TO MAKE IT SUBJECT TO THE WAGE PROVISIONS OF SAID ACT?

(2) DID THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN REFUSING TO HOLD THAT PETITIONER WAS NOT LIABLE FOR FAILURE TO PAY MINIMUM WAGES AND OVERTIME COMPENSATION BY REASON OF THE PORTAL-TO-PORTAL ACT OF 1947 (29 U.S.C. 259)?

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8 of the Constitution of the United States, insofar as pertinent:

"*Powers of Congress*.—[1.] The congress shall have power ...

[3.] To regulate commerce ... among the several states, ..."

STATUTES INVOLVED

The following statutes are involved:

Title 29, U.S.C., Sections 203(r) and 259.

STATEMENT

Petitioner is a private country club with a select membership and this was averred in the complaint. Respondent brought suit to enjoin petitioner from violating Sections 15(a)(2) and 15(a)(5), Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 215(a)(2) and (5)) and alleging underpayment of minimum wages and overtime compensation to its employees.

The complaint contends petitioner is an "enterprise" as that term is used in the above provisions, and that petitioner's annual gross volume of business was not less than $500,000 from February 1, 1967 to February 1, 1969, and not less than $250,000 from February 1, 1969 to the date of the filing of the complaint, and for this reason petitioner met the test of an "enterprise" as defined in 29 U.S.C. 203(s)(1) of said Act.

Petitioner denied it was covered by said Act, and averred it is the ultimate consumer of all articles purchased; that all goods, chattels and other articles purchased by it, with the exception of approximately $5,000, had lost their interstate character at the time of their delivery to petitioner; that it was not an "enterprise" as defined by said Act; that it manufactures no goods, wares, products or merchandise shipped either in intrastate or interstate commerce; it manufactures nothing; it only converts raw materials, such as meats, vegetables and condiments incident thereto, into edible food which is sold to its private club members; it did not have an annual gross volume of sales and did not do business as an "enterprise" from February 1, 1967 of not less than $500,000 nor less than $250,000 beginning February 1, 1969 to the date of filing of the complaint; it is not a retail or service establishment open to the general public and, therefore, was exempt under said Act; it is a private establishment to serve "its select membership" and, therefore, is exempt from the provisions of said Act under Section 779.319 Interpretative Bulletin, Title 29, Part 779 of the Code of Federal Regulations which is contained in WHPC Publication 1133 of the U. S. Department of Labor, which provides, on page 50:

> "... Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public ..."

Petitioner plead further that it relied upon said Interpretative Bulletin and, if it should be construed to be in interstate commerce, it was not subject to the Act or liable for wages under the Act by reason of the Portal-to-Portal Act of 1947, (29 U.S.C. 259), pertinent portion of which provides:

"§ 259. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC. —

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

"(b) The agency referred to in subsection (2) shall be —

"(1) in the case of the Fair Labor Standards Act of 1938, as amended — the Administrator of the Wage and Hour Division of the Department of Labor; . . ."

The District Court sustained all the contentions of respondent and petitioner was ordered to pay $5,444.19 into the Court for distribution to certain employees of petitioner, if found, and if not found the residue to be paid into the Treasury of the United States.

The United States Court of Appeals for the Sixth Circuit, on April 17, 1970, entered a simple order, citing no law, affirming the District Court "for the reasons set forth in the memorandum opinion" filed by the District Court.

SPECIFICATIONS OF ERRORS TO BE URGED

(1) The United States Court of Appeals for the Sixth Circuit erred in holding that petitioner was an "enterprise" within the meaning of Section 3(r) of the Fair Labor Standards Act and liable for wages under said Act.

(2) The United States Court of Appeals for the Sixth Circuit erred in refusing to hold that petitioner was not liable for said wages by reason of the Portal-to-Portal Act of 1947, (29 U.S.C. 259).

REASONS FOR GRANTING THE WRIT

Petitioner is a legitimate private country club with 450 golfing members and 1000 social members and their families, making a total membership of over 3,000. The effect of the decision in the Courts below has been to deny the existence, insofar as petitioner is concerned, of "intrastate" commerce, and to hold that its every activity is "interstate" commerce. The decision in effect abolishes "intrastate" commerce.

This is a case of first impression. No private country club prior to this decision has been held to be engaged in interstate commerce so as to make the act in question applicable. The decision in this case, if allowed to stand, will affect every private country club in the United States; not only insofar as the Fair Labor Standards Act is concerned, but any other provision of law involving inter-

state commerce. The decision is far reaching and involves a substantial question of law that should be decided by this Court.

The decision is contrary to all pre-existing law as to the distinction between intrastate and interstate commerce. Admittedly, petitioner manufactures nothing and everything purchased by it, with the exception of some $5,000 in merchandise, had come to rest within the State of Tennessee and was then in the hands of a dealer and was then purchased by order of the petitioner from such dealer.

Under the decision in this case once an article is in interstate commerce it can never again enter intrastate commerce.

Furthermore, it is undisputed in this case that petitioner relied in good faith upon the provisions of the Portal-to-Portal Act of 1947, which was a complete defense and a bar to this action, and no judgment should have been entered in favor of respondent in this case by reason thereof.

In *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, (1968), the Court deals with the term "enterprise concept", defining the term which we submit can in no wise apply to the activities of petitioner because petitioner has no employees engaged in commerce or in the production of goods for commerce, either intrastate or interstate. This Court there stated that the effect of the 1961 change was to extend protection to fellow employees of any employee who would have been protected in the original Act, but not to enlarge the class of employers subject to the Act. In other words, no additional employers were added by the 1961 amendment. Prior to the 1961 amendment, petitioner as a retail and service establishment, not serving the general public was exempt, and the 1961

amendment as ruled by this Court did not change that exemption.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT,
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Counsel for Petitioner.

NO. 20,101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE P. SHULTZ Plaintiff-Appellee v. DEANE HILL COUNTRY CLUB, INC. Defendant-Appellant	ORDER

ORDER

Before: PECK, COMBS and BROOKS, Circuit Judges.

This cause coming on to be considered on the record on appeal, the briefs of the parties and the oral arguments of counsel, the Court concludes that the District Court's resolutions of the issues presented was correct and that no error intervened in the proceedings, and therefore,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed for the reasons set forth in the memorandum opinion filed by Judge Robert L. Taylor.

ENTERED BY ORDER OF THE COURT

/s/ Carl W. Reuss
Clerk

April 17, 1970

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OCTOBER TERM, [redacted] 1970

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A CORPORATION,
Petitioner,

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
Eastern District of Tennessee
Northern Division

Civil No. 6606

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

DEANE-HILL COUNTRY CLUB, INC.,
a Corporation,
Defendant.

MEMORANDUM

(Filed September 26, 1969)

George P. Shultz, Secretary of Labor, seeks to enjoin Deane-Hill Country Club, Inc. from violating Sections 15-(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended. 29 U.S.C. 215(a)(2) and (5). The Secretary also seeks payment of any unpaid minimum wages and overtime compensation due employees under the Act. 29 U.S.C. 217.

The Secretary claims that Deane-Hill is an enterprise within the meaning of Section 3(r) of the Act.[1] 29 U.S.C.

[1] "(r) 'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: ..."

203(r). The Secretary contends that during the period since February 1, 1967 the Deane-Hill facilities and activities were related and performed through unified operations and under common control and for common business purposes. He says that the enterprise has employees engaged in interstate commerce or in the production of goods for commerce, including employees handling, selling or otherwise working on goods that have been moved in, or produced for commerce by other persons, and that its annual gross volume of business was not less than $500,000.00 ($250,000.00 since February 1, 1969) exclusive of excise taxes. Therefore, he concludes that Deane-Hill meets the test of a covered enterprise as defined in Section 3(s)(1) of the Act (29 U.S.C. 203(s)(1)), which is as follows:

> "(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which——
>
> "(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000

(exclusive of excise taxes at the retail level which are separately stated);"

The Secretary likewise contends that during the period since February 1, 1967 Deane-Hill has either paid some of its employees less than the minimum wage or [fol. 3] has failed to pay overtime compensation as provided by the Act;[2] that in the instances where hours worked records have been maintained, these violations appear on the face of Deane-Hill's payroll records; that Deane-Hill has failed to maintain records of daily and total weekly hours worked with respect to certain employees; and that Deane-Hill has refused to make its records available to the Secretary's representative.

Defendant Deane-Hill denies that it is covered by the Act. It claims that it is the ultimate consumer, and when any goods, chattels, or other articles in commerce

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[2] Section 206(b)

"Every employer shall pay to each of his employees ... who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, ... wages at the following rates:

"(1) not less than $1 an hour during the [period February 1, 1967—February 1, 1968]...

"(2) not less than $1.15 an hour during the [period February 1, 1968—February 1, 1969]...

"(3) not less than $1.30 an hour during the [period February 1, 1969—February 1, 1970]..."

Section 207(a)(2)

"No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce...

"(A) for a workweek longer than forty-four hours during the [period February 1, 1967—February 1, 1968]..."

(Continued on following page)

reach it, such goods have ceased to be in interstate commerce at the time of delivery to defendant. Defendant denies that it is engaged in interstate commerce to such an extent as to be covered by the Act because its annual gross volume of sales or business done is less than that amount required by the Act. Defendant denies [fol. 4] that any pro shop or golf rental operations conducted at its location should be included within its annual gross volume of sales because these activities are not part of its "enterprise." Defendant subsequently amended its answer to additionally claim that any complaint was barred by a good faith reliance upon an interpretation of the Administrator of the Wage and Hour Division of the Department of Labor under Section 10 of the Portal-to-Portal Act of 1947. 29 U.S.C. 259.

Defendant is a Tennessee corporation located in Knoxville, Tennessee. It operates a private country club and sells goods and services to its members or their guests. The membership is around 1,400, 450 of which are golf members. There are approximately 1,490 outstanding shares of stock, 595 of which are owned by Mr. Jack Comer, or about 40%. Mr. Comer has voted by proxy 283 shares, or 19%, at one or more meetings of the stockholders. Mr. Comer, his wife and brother are members of the Board of Directors. Dr. J. P. Cullom, the owner of 215 shares of stock, is Chairman of the Board. The President, Mr. Lloyd Cannon, owns one share of stock.

(Continued from preceding page)

"(B) for a workweek longer than forty-two hours during the [period February 1, 1968—February 1, 1969]

"(C) for a workweek longer than forty hours after [February 1, 1969] unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

He is a full-time employee and works as night manager. Mr. J. W. Townsend is the day manager. The remaining shares of stock are owned by some 55 to 60
[fol. 5] persons owning a minimum of one share to a maximum of 65 shares.

Deane-Hill's club building is located on a parcel of land consisting of 160 acres. There are also located on the land a club house, a swimming pool and a golf course. Facilities for serving food and beverages are located within the club house. There is also a Pro Shop. Club members desiring to use the golf course are required to check in through the Pro Shop where they pay green fees and driving range fees, rent golf carts and purchase any golf equipment or supplies they may need. These proceeds are turned over to the defendant at the end of the day. Deane-Hill furnishes the space, pays all the utility bills for the Pro Shop, pays the wages and furnishes meals to the employees working in the Pro Shop. The basic inventory of the Pro Shop is owned by the defendant, with the golf professional ordering any merchandise as needed.

Prior to October 1, 1967, Mr. Lloyd Foree was defendant's golf professional, and Mr. Vernon Thwaites was the assistant professional. Each was paid a weekly salary by the defendant. The salary of Mrs. Thwaites, who worked in the Pro Shop, was also paid by the defendant. Foree left on October 26, 1967 and was replaced by Thwaites, who made no investment in the merchandise on hand. Thwaites' employment terminated on September 24, 1968, and defendant was without a golf professional until February 15, 1969, when Foree returned. Foree made no investment in the merchandise stocked. He stated, in effect, that he wasn't financially able to pay for
[fol. 6] the stock when he returned to Deane-Hill. How-

ever, as he becomes financially able, he expects to pay Mr. Comer for the inventory. As he repays Mr. Comer's advancements, he will receive the profits from the Pro Shop. He also stated that he ran the Pro Shop as his own business.

Since February 24, 1967, Jesse Townsend, defendant's day manager, has made all bank deposits for the Pro Shop, approved the merchandise ordered and signed all checks in payment thereof and kept the books and records, including those pertaining to golf car income. Foree, the pro, has recently received authority to sign checks on the Pro Shop's account.

The golf carts used by defendant's members on its golf course are owned by Country Clubs, Inc., a Tennessee corporation owned exclusively by Mr. Jack Comer, President and Treasurer, and his wife, Marjorie Comer, Secretary. Mr. Lloyd Cannon, night manager for the defendant, is Vice President of Country Club, Inc. Country Clubs, Inc. has no employees of its own and the carts are repaired, maintained, and generally looked after by defendant's employees, but Country Clubs, Inc. pays the mechanics of defendant $200.00 extra for looking after the carts. Defendant furnishes parking and storage space for the carts. Club members renting a golf cart are required to enter into a written lease. Exhibit 1 is a lease form. The defendant's name and address head the form. The form contains language that indicates "The Club" is the lessor. Mr. Comer testified that this form was discontinued before the investigation which preceded [fol. 7] this suit. Mr. Foree, the present pro, stated that the form had been discontinued within the last month. Cart rental fees are collected by the Pro Shop employees. The defendant retains 25% of the gross rental receipts and turns the balance over to Country Clubs, Inc.

All of the activities conducted at the defendant's country club are related activities. They are conducted through unified operation and under common control for a common business purpose. *Wirtz v. Columbian Mutual Life Insurance Co.*, 380 F.2d 903 (C.A. 6, 1967). The cart rental and Pro Shop activities are included in the defendant's enterprise activities. *Wirtz v. Barnes Grocer Co., et al*, 398 F.2d 718 (C.A. 8, 1968); *West v. Wal-Mart, Inc.*, 264 F. Supp. 158 (W.D. Ark., 1967).

The Court further finds that defendant's golf professionals are not independent contractors within the meaning of Section 3(r) as performing related activities for the enterprise. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Western Union Tele. Co. v. McComb*, 165 F.2d 65 (C.A. 6) cert. den. 333 U.S. 862, reh. den. 333 U.S. 883 (1948); and see this Court's ruling in *Burry v. National Trailer Convoy, Inc.*, 239 F. Supp. 85 (E.D. Tenn., 1963), aff'd. 338 F.2d 422 (C.A. 6, 1964).

Mr. Townsend stated that the revenue for the year 1967 was $497,762.00, including dues which did not include income from the golf cars, Pro Shop, sales of merchandise and total golf cart rentals. With these items [fol. 8] included, the annual gross volume of sales or business would exceed $500,000.00. He further stated that the revenues for 1968, not including the Pro Shop revenues, amounted to $539,999.00.

In determining whether the gross volume test of Section 3(s) is met the gross receipts of all the activities which make up the enterprise must be counted. *Wirtz v. Jernigan*, 405 F.2d 155, 159 (C.A. 5, 1968); *Wirtz v. Columbian Mutual Life Ins. Co.*, 246 F. Supp. 198 (W.D. Tenn., 1965), aff'd. 380 F.2d 903 (C.A. 6). The

Court finds that during the period since February 1, 1967 defendant's annual gross volume of sales made or business done exceeded $500,000.00.

The defendant regularly receives each week shipments of merchandise from out-of-state suppliers. It regularly purchases and receives a substantial volume of goods which have moved in interstate commerce or which were produced for commerce. Most of the merchandise is bought from local distributors. A large part of this merchandise moved in interstate commerce before it reached the distributors. Defendant's employees order, receive, handle sell or otherwise work on goods which moved in interstate commerce and keep the books and records pertaining to these goods.

Defendant has employees engaged in interstate commerce or in the production of goods for interstate commerce, including employees handling, selling [fol. 9] or otherwise working on goods that have moved in or were produced for commerce. These employees regularly order and receive merchandise shipped directly from out-of-state suppliers. Such activities constitute engagement in commerce or in the production of goods for commerce. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568; *McComb v. Wright*, 168 F.2d 40, 42 (C.A. 6), cert. den. 335 U.S. 854; *Mitchell v. Royal Baking Co.*, 219 F.2d 532, 534 (C.A. 5); *McComb v. Herlihy*, 161 F.2d 568, 570 (C.A. 4). See also, *Mabee v. White Plains Publ. Co.*, 327 U.S. 178.

Defendant's employees also use regularly goods which although purchased locally have previously moved in interstate commerce and this is sufficient to satisfy the test used to determine whether employees are engaged

in interstate commerce. Section 203(s) extends coverage to enterprises which may not purchase goods directly from out-of-state but which do have employees who handle "goods that have been moved in ... commerce" and which have come to rest within the state. *Wirtz v. Malos Construction Co.*, 408 F.2d 626, 629 (C.A. 2, 1969); *Wirtz v. Mayer Construction Co.*, 291 F. Supp. 514 (D.C. N.J., 1968); cf. *Katzenbach v. McClung*, 379 U.S. 294.

The defendant during the period since April 24, 1967 has failed to pay the applicable minimum wage or overtime compensation to the list of employees and the respective amounts shown on Exhibit 17, which was explained in detail by Mr. Fred Gray, a compliance officer of the Knoxville Wages and Hours Administration.[3]

[fol. 10] The Fair Labor Standards Act as originally enacted in 1938 applied only to those employees who were themselves engaged in interstate commerce or in the production of goods for commerce. In 1961, as amended in 1966, the Act's coverage was extensively broadened so as to include all employees of certain enterprises meeting the conditions prescribed in Section 3(r) and 3(s) of the Act. (See Footnote 1). Thus, where the employer's operations satisfy the prescribed statutory tests, all employees in the enterprise are covered without regard to the nature of their activities. *Childress v. Earl Whitley Enterprise*, 388 F.2d 742, 744-745 (C.A. 4, 1968); *Maryland v. Wirtz*, 392 U.S. 183 (1968).

Defendant amended its answer on September 3, 1969 by adding the defense that it acted in good faith and in conformity with the regulations and interpretations placed

[3] Defendant maintained no record of hours worked with respect to ten employees, but the payroll records show the amount of wages paid.

upon the Fair Labor Standards Act by the Department of Labor, and particularly Section 779.249 and Section 779.319 Interpretative Bulletin "The Fair Labor Standards Act as Applied to Retailers of Goods or Services", 29 C.F.R. § 779, which states on page 35 under Section 779-249:

"FOURTH CONDITION OF A 3(s)(1) ENTERPRISE; INFLOW TEST

"To come within the scope of section 3(s)(1) the enterprise, in addition to the other conditions, must purchase or receive goods for resale that move or have moved across State lines (not in deliveries
[fol. 11] from the reselling establishment) which amount in total annual volume to $250,000 or more. To meet this condition, it must be shown that (a) the enterprise purchases or receives goods for resale (section 779.251) and (b) that such goods move or have moved across State lines (section 779.252); and (c) that such purchases and receipts amount in total annual volume to $250,000 or more (Section 779.256)."

Defendant says that it did not during the years in question receive for resale any of the goods that moved across state lines which amounted to an annual volume of $250,000 or more and has not met the conditions of an enterprise as defined in 3(s) of the Act as amended.

Defendant further says that Section 779.319 provides that "A RETAIL OR SERVICE ESTABLISHMENT MUST BE OPEN TO THE GENERAL PUBLIC," and that defendant is not open to the public.

"... Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public ..." p. 50 of the Bulletin

Defendant says that it relied upon the Interpretative Bulletin and that even if it is engaged in interstate commerce it is not subject to the Act and is not liable for its failure to pay minimum wages or overtime compensation by reason of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259, which provides in pertinent part as follows:

"§ 259. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC., —

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under
[fol. 12] the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

"(b) The agency referred to in subsection (2) shall be —

"(1) in the case of the Fair Labor Standards Act of 1938, as amended—The Administrator of the Wage and Hour Division of the Department of Labor;"

* * *

During the trial, statements were made by counsel that the Nashville Office of the Labor Department had caused to be printed on Interpretative Bulletin 779 language pointing out that the bulletin was subject to the changes made in the 1961 Act by the amended 1966 Act. Both parties submitted a copy of the Interpretative Bulletin to the Court. The copy provided by the Secretary has no notation about the 1966 amendments. The copy submitted by defendant is stamped "The Fair Labor Standards Amendments of 1966 (effective February 1, 1967) have not been incorporated into this document. See Public Law 89-601 which contains these amendments."

An administrative ruling appears to have been made on private clubs in response to a letter of a representative of one of such clubs as to whether or not the [fol. 13] Fair Labor Standards Act was applicable. This ruling is in letter form and reads in pertinent part as follows:

"As is recognized in your letter, the term 'retail or service establishment', for the purposes of the Act requires that the establishment be available to the general public. Since the country and town clubs with which you are concerned are available only to a select group of persons who have been specially selected to club membership, you are right in assuming the retail exemption does not apply. Therefore, the exemptions provided in the Act that are applicable only to employees of retail or service establishments (such as

section 13(a)(2), section 13(b)(18), the 40 percent tolerance for executive and administrative employees in section 13(a)(1), and the full-time student provision in section 14(b), are not available to employees of private clubs."

Opinion Letter No. 655, Wage-Hour Administrator, September 5, 1967, C.C.H. Lab. L. Rep. Wages-Hours ¶ 30,646.

Defendant's counsel stated during the argument that defendant received no notice of the opinion and did not learn about it until recently. The Secretary did not promulgate any rulings or regulations under the Fair Labor Standards Act as amended in 1966, and the defendant cannot rely on such inaction of the Secretary as a defense to the claims in the complaint under the Portal-to-Portal Act. 29. U.S.C. § 259.

The Secretary does not contend that the defendant is a retail establishment holding itself out to the general public. He says defendant does not qualify as a "retail or service establishment" within the meaning of Section 213-(a)(2) of the Act. He, therefore, contends that since defendant does not qualify for the retail or service establishment exemption it is not exempt from the [fol. 14] requirements of the Act. Section 213(a)(2) appears to apply only to those establishments which are retail, but plaintiff says even if defendant's establishment were open to the public and retail in character, the exemption would not apply in any event under the further provisions of section 213(a)(2) since defendant is an "enterprise described in section 3(s)" and has an annual dollar volume of sales in excess of $250,000.00, exclusive of excise taxes.

The Court is of the opinion and finds that defendant does not come within the exemption provided for in Section 213(a)(2) of the Act because it is an enterprise within the meaning of the 1966 amendment to the Act.

In sum, the Court holds that defendant, Deane-Hill Country Club, meets the test of a covered enterprise as described in Section 203(s)(1) of the Fair Labor Standards Act so as to bring its employees within the coverage of the Act. Defendant is subject to the Act and has paid a number of its employees shown on Exhibit 17 less than the applicable minimum wage or failed to pay overtime compensation to the employees named in the exhibit. Plaintiff is entitled to the injunction relief sought in the complaint.

/s/ Robt. L. Taylor
United States District Judge

[fol. 1] [Caption Omitted]

ORDER AMENDING MEMORANDUM FILED SEPTEMBER 26, 1969

(Filed October 1, 1969)

It is ORDERED that the memorandum of this Court filed September 26, 1969 be, and same hereby is, amended so as to strike the citation "29 U.S.C. 216(c)" on line 6; page 1, and insert in lieu thereof "29 U.S.C. 217."

Enter:

/s/ Robt. L. Taylor
United States District Judge

[fol. 1] [Caption Omitted]

JUDGMENT

(Filed October 6, 1969)

This cause having come on for trial before the Court sitting without a jury at Knoxville, Tennessee, on the 9th day of September, 1969 and a written memorandum opinion, serving as the Court's findings of fact and conclusions of law, having been duly entered herein,

NOW, THEREFORE, upon the said memorandum opinion, and sufficient reasons therefor appearing, it is hereby

ORDERED, ADJUDGED and DECREED that the defendant, Deane-Hill Country Club, Inc., its officers, agents, servants, employees and all persons acting or claiming to act in its behalf or interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, et seq.), hereinafter referred to as the Act, in any of the following manners:

(1) The defendant shall not, contrary to sections 6 and 15(a)(2) of the Act, pay to any of its employees who are employed in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, as such terms are defined in the Act, wages at a rate less than $1.30 an hour ($1.45 from February 1, 1970 to February 1, 1971, and $1.60 thereafter) or such other minimum hourly rate as may hereafter be made applicable by any amendment of the Act.

[fol. 2] (2) The defendant shall not, contrary to sections 7 and 15(a)(2) of the Act, employ any employee in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, as such terms are defined in the Act, for a workweek longer than 40 hours unless such employee receives compensation for such excess hours in each such workweek at a rate not less than one and one-half times the regular rate at which he is employed.

(3) The defendant shall not fail to make, keep and preserve adequate and accurate records of its employees and of the wages paid, hours worked and other conditions and practices of employment maintained by defendant, as prescribed by the regulations of the Administrator issued, and from time to time amend, pursuant to section 11(c) of the Act and found in 29 CFR 516, including but not limited to records showing adequately and accurately, among other things, the hours worked each workday and total hours worked each workweek, regular hourly rate of pay, total daily or weekly straight-time earnings and total weekly overtime excess compensation, with respect to its employees; and shall not fail to make its records available for inspection and transcription by the duly authorized representative of the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority of section 11(a) of the Act.

(4) The defendant shall not continue to withhold payment of the minimum wages and overtime compensation found by the Court to be due under the Act to defendant's employees as identified in Exhibit 17 filed herein, and in the amounts shown with respect to each. The provisions

of this paragraph of this judgment shall be deemed satisfied by defendant's delivery to plaintiff's attorneys of a cashier's or certified check in the amount of $5,444.19 within 30 days from the entry of this judgment. Plaintiff shall distribute the proceeds of said check to the employees or to their legal representatives as their interests appear, after making appropriate legal deductions, and any such sum not paid out by the plaintiff within one year (either because of inability to locate the person to whom the money is due or his legal representative, or because of such person's refusal to accept payment) shall be covered into the Treasury of the United States as miscellaneous receipts.

[fol. 3] It is FURTHER ORDERED that the legally taxable costs and disbursements incurred in this action be paid by the defendant for which execution shall issue upon application therefor.

Enter:

/s/ Robt. L. Taylor
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 185

DEANE-HILL COUNTRY CLUB, INC.,
A CORPORATION, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals did not write an opinion. The memorandum opinion of the district court (Pet. Supp. App. 1–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1970. The petition for a writ of certiorari was filed on May 25, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a country club, constitutes an "enterprise engaged in commerce" within the meaning of Sections 3(r) and 3(s)(1) of the Fair Labor Standards Act.

STATUTE INVOLVED

The applicable statutory provisions of the Fair Labor Standards Act read in pertinent part, as follows:

> SEC. 3 [29 U.S.C. (Supp. V) 203]. As used in this Act—
>
> * * * * *
>
> (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.
>
> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 * * * and beginning February 1, 1969, is an enterprise whose

annual gross volume of sales made or business done is not less than $250,000 * * *.

* * * * *

SEC. 13(a) [29 U.S.C. (Supp. V) 213]. The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment * * * if * * * such establishment is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 * * *.

STATEMENT

The Secretary of Labor brought this action against petitioner under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to enjoin violations of the minimum wage, overtime and recordkeeping provisions of the Act, and to restrain the continued nonpayment of minimum wage and overtime compensation due its employees. Petitioner denied that it was subject to the Act, claiming (1) that is was not a covered "enterprise" as defined in Sections 3(r) and 3(s)(1) of the Act, (2) that it was exempt as a "retail or service establishment" and (3) that, in any event, it had relied in good faith on a written administrative interpretation and therefore was relieved of liability by the Portal-to-Portal Act of 1947 (29 U.S.C. 259).

1. Petitioner, Deane-Hill Country Club, a Tennessee Corporation located in Knoxville, Tennessee, owns about 160 acres of land on which it operates a club-

house with complete dining and other facilities, an 18-hole golf course, a driving range, a swimming pool, and a pro shop and locker room for the golfers (A. 8–9, 57–58).[1] Golf carts are rented for use on the course by Country Clubs, Inc., a company whose stock is entirely held by the chief stockholder and managing director of Deane-Hill and his wife (A. 38–39; P. Ex. 4). Country Clubs, Inc., whose business activities are limited solely to the rental of carts to Deane-Hill golfers, has no regular employees of its own and utilizes Deane-Hill employees to rent and maintain the carts. The rental form that golfers execute specifies Deane-Hill as lessor. Country Clubs, Inc. pays no rent or utility bills to Deane-Hill. Fuel and spare parts for the carts are usually ordered and paid for initially by Deane-Hill (A. 42–46, 98).

The pro shop, which serves as the "control point" for the golf course, sells merchandise (A. 58–60), with all receipts being deposited into a separate "Deane-Hill Pro Shop account" (A. 92–93). The operating costs for the pro shop—rent, utility bills, telephone bills and wages of employees working in the pro shop—are paid by Deane-Hill (A. 72).

Deane-Hill regularly purchases goods both directly from out-of-state suppliers and from local suppliers of goods originating from out-of-state.[2] As found by

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[1] "A" references are to the Appendix Record before the court of appeals.

[2] During the period from April 1967 to April 1969, 246 separate shipments of goods were sent directly to Deane-Hill from outside Tennessee and deliveries of such goods took place practically every week (P. Ex. 14; A. 146–147). Deane-Hill's

the district court, petitioner has employees who "regularly order and receive merchandise shipped directly from out-of-state suppliers," as well as employees who also handle "regularly goods which although purchased locally have previously moved in interstate commerce" (Pet. Supp. App. 8).

In 1967 and 1968, Deane-Hill's gross sales volume (exclusive of receipts from pro shop sales of merchandise or golf cart rentals) was $497,762 and $539,999, respectively (A. 190–191, P. Exs. 6 and 10). Pro shop sales of merchandise for 1967 totaled $31,042 and golf cart rentals for that year brought in $35,386. Thus, the addition of either of the latter amounts would push petitioner's 1967 receipts over $500,000.

2. The district court held that Deane-Hill was subject to the Act's requirements as an "enterprise engaged in commerce" within the meaning of Sections 3(r) and 3(s)(1) of the Act. It rejected petitioner's argument that the golf cart and pro shop receipts could not be included in calculating the annual gross sales volume of the Deane-Hill enterprise, ruling that the rental of carts and sale of merchandise were related to the other activities of the country club (Pet. Supp. App. 7). Both petitioner's employees who regularly order and receive merchandise shipped directly from out-of-state suppliers and those employees who

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purchases from local suppliers of goods which originated outside the State included an average of 90 cases of beer a week at a cost totaling approximately $25,000 a year (A. 100–101, 111) and substantial quantities of food (A. 113–114, 118–121, 126–127). In addition, about 50 percent of the merchandise sold in the pro shop and most of the parts used in repairing the golf carts originated outside of Tennessee (A. 41, 78).

regularly handle goods purchased locally but which previously moved in interstate commerce were found by the court to be "engaged in commerce" within the meaning of Section 3(s) (Pet. Supp. App. 8–9). The district court also held that defendant was not exempt as a "retail or service establishment" under Section 13(a)(2), and that it did not have a "good faith" defense under the Portal-to-Portal Act of 1947 (Pet. Supp. App. 12–14).

The court of appeals affirmed in a brief order "for the reasons set forth in the memorandum opinion" of the district court (Pet. 9).

ARGUMENT

1. The clearly correct ruling below that all of the activities conducted at the country club constitute an "enterprise" within the meaning of Section 3(r) of the Act, accords with decisions of the courts of appeals of the Fifth, Eighth and Tenth Circuits finding related activities to constitute "enterprises" under circumstances where there was considerably less unity of control or integration of operations than here. See, *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1299–1302 (C.A. 5); *Wirtz* v. *Barnes Grocer Co.*, 398 F.2d 718, 721 (C.A. 8); *Wirtz* v. *First National Bank and Trust Co.*, 365 F.2d 641, 643–645 (C.A. 10).

2. The further ruling below that petitioner was an "enterprise engaged in commerce" because it had employees "engaged in commerce" within the meaning of Section 3(s) of the Act was also clearly correct. Both those employees ordering and receiving inter-

state shipments as well as those handling locally purchased goods which had originated in interstate commerce were plainly, in the words of Section 3(s) "employees engaged in commerce * * *, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *."

In contesting this ruling, petitioner relies on the statement in *Maryland* v. *Wirtz*, 392 U.S. 183, 188, that the 1961 amendments to the Fair Labor Standards Act (which added Sections 3 (r) and (s) and adopted the "enterprise" concept of coverage) extended the coverage of the Act to certain additional employees, but did not enlarge the class of employers subject to coverage. As has been pointed out by the Second Circuit, in *Wirtz* v. *Melos Construction Corp.*, 408 F. 2d 626, 628, n. 5, however, the *Maryland* decision was concerned only with the validity of the "enterprise" approach of the 1961 amendments and did not address itself to the language of Section 3(s) which specifically defined "employees engaged in commerce" to include employees handling goods which had been moved in interstate commerce. The original Act had simply applied to "employees engaged in commerce" without the additional expanding language. To the extent that the phrase "engaged in commerce" was thus expanded in 1961, the class of employers subject to the Act was obviously affected. In any event, since petitioner has employees who meet either the original or the amended "commerce" test, its coverage by the Act is not open to question.

3. Petitioner's contention that its business is exempt from the Act as a "retail or service establishment" within the meaning of Section 13(a)(2) of the Act is without merit. Petitioner apparently relies on an interpretative bulletin of the Department of Labor to support this claimed exemption. The provision on which it relies, 29 C.F.R. 779.319, however, does not further its cause but explicitly states that an establishment "must be open to [the] general public" in order to qualify for the "retail or service establishment" exemption. See also the Opinion Letter No. 655, quoted in the court's opinion below (Pet. Supp. App. 12–13), which specifically states that the exemption does not apply to "country and town clubs * * * [which] are available only to a select group of persons who have been specially selected to club membership." Furthermore, even if petitioner's business had previously been within this exemption, the express language of the exemption, as amended in 1966 (80 Stat. 830, 833), limits its application to establishments having "an annual dollar volume of sales which is less than $250,000."

Because of the obvious inapplicability of both the Section 13(a)(2) exemption and the interpretative bulletin, petitioner's final claim that the good faith reliance provisions of the Portal-to-Portal Act of 1947 (29 U.S.C. 259) excuses its failure to comply with the wage and hour provisions of the Fair Labor Standards Act is frivolous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

LAURANCE H. SILBERMAN,
Solicitor of Labor,
BESSIE MARGOLIN,
Associate Solicitor
CARIN ANN CLAUSS,
Attorney,
Department of Labor.

JULY 1970.